85-702

Supreme Court, U.S.
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No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RAUL MADRID, *et al.*,
Petitioners,
v.
ANTONIA MONTELONGO, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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October 25, 1985

QUESTIONS PRESENTED FOR REVIEW

1. Whether the class action tolling rule of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), tolls the statute of limitations with respect to persons not named as defendants in the original pleading with respect to claims not contained in the original pleading.

2. Whether Fed.R.Civ.P. 15(c) permits the relation back of a counterclaim amendment which seeks to add new parties as defendants after the statute of limitations has already expired where there was no mistake concerning the identity of the original counterclaim defendant.

PARTIES TO THE PROCEEDING BELOW

The respondents before this Court, who were counterclaim plaintiffs in the district court and appellants-cross appellees in the court of appeals, are Mexican farm workers residing in the area of Ojinaga, Chihuahua, Mexico, who were admitted as temporary foreign workers (H-2 workers) pursuant to Immigration and Naturalization Service authorization to work in the Presidio Valley of Texas in 1978-79.

The petitioners before this Court, who were counterclaim defendants before the district court and appellees-cross appellants before the court of appeals, are the following individuals, partnerships, and corporations that farmed in the Presidio Valley of Texas in 1978-79:

Alberto Armendariz
Francisco Armendariz
Billy Joe Bishop
Larencio Brito
Demetrio Carrasco
Pablo O. Carrasco
Flavio Estrada
K. C. Produce
Raul Madrid
Cecilio Morales
Antonio Pena
Presidio Produce, Inc.
Jose Rodriquez
Victor Thiel
Charlie Weinacht
Carlos S. Armendariz
Luis Armendariz
Terry Bishop
Calixtro Carrasco
Jesus B. Carrasco
Teofilio Carrasco
Rosendo Evaro
Madeira Valley Farms
Ruben H. Madrid
Hector Morales
Trinidad Pena
Presidio Valley Farms, Inc.
Oscar Spencer
Joe Turner

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DECISIONS BELOW

On April 16, 1984, the United States District Court for the Western District of Texas, Pecos Division, issued its memorandum opinion and judgment. The opinion, which is not reported, appears at Appendix A hereof, and the judgment appears at Appendix B hereof. The district court issued an order amending judgment on May 3, 1984, which appears at Appendix C hereof.

On July 25, 1985, the United States Court of Appeals for the Fifth Circuit issued its decision affirming in part, reversing in part, vacating in part, and remanding to the district court. That opinion is reported at 765 F.2d 1353 (5th Cir. 1985) and appears at Appendix D hereof. On September 19, 1985, the Fifth Circuit denied the petitioners' timely petition for rehearing and suggestion for rehearing en banc and the respondents' timely petition for rehearing. The order denying the petitions for rehearing appears at Appendix E hereof.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The statutes involved below were the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.*, and the Farm Labor Contractor Registration Act, 7 U.S.C. § 2041 *et seq.*, repealed effective April 14, 1983 by the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801 *et seq.* The issues presented by this petition do not directly involve either of those statutes. For that reason, they are not reprinted in the Appendix.

STATEMENT OF THE CASE

The only issues remaining in this case arise out of a counterclaim brought by Mexican farm workers against the Presidio Valley Farmers Association and certain Presidio Valley farmers. The litigation began, however, in May, 1978, when the Association, a non-profit Texas corporation, filed suit against the United States Department of Labor ("USDOL") and the Immigration and Naturalization Service ("INS") in the United States District Court for the Western District of Texas, El Paso Division. The Association sought injunctive relief against the USDOL and INS to compel the admission of temporary foreign workers ("H-2 workers") to work in the Presidio Valley of Texas. *Presidio Valley Farmers Association v. Marshall*, No. EP-78-CA-95 (W.D. Tex., El Paso Div., filed May 18, 1978). The district court, per Judge Sessions, granted the injunctive relief and ordered the admission of the temporary foreign workers.[1]

Two U.S. workers intervened in the action in opposition to the Association's requested injunctive relief. On July 17,

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[1]330 H-2 workers were admitted on 70-day visas that expired in July, 1978, and 70 H-2 workers were admitted on visas that expired on April 30, 1979.

1978, counsel for the U.S. workers[2] filed a motion to join as defendants two Mexican workers who had been admitted to work as H-2 workers in the Presidio Valley in 1978 by virtue of Judge Sessions' preliminary injunction.[3] Intervenors stated in their motion to join that they and the two H-2 workers they sought to join ". . . assert a common right to relief against the Plaintiff ASSOCIATION because of the ASSOCIATION's failure to fulfill its obligations under applicable federal and state law and pending court orders." On the same day, the intervenors filed a counterclaim against the Association. The counterclaim was brought as a class action, and it named only one counterclaim defendant, the Presidio Valley Farmers Association, which it clearly identified as a non-profit Texas corporation. The counterclaim set forth four causes of action based on the Immigration and Nationality Act, the USDOL's H-2 certification regulations, Texas law, and breach of contract but did not contain a cause of action based on the Farm Labor Contractor Registration Act ("FLCRA").[4]

On March 18, 1981, the district court, per Judge Hudspeth, issued an order allowing joinder of the two H-2 workers.[5]

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[2]From the very beginning, the U.S. workers and the H-2 workers were represented by the Texas Rural Legal Aid, Inc., a 50-lawyer legal services program funded by the Legal Services Corporation which had extensive experience litigating cases based upon FLCRA and the H-2 regulations.

[3]The Association opposed the motion to join the two H-2 workers, noting that joinder of the H-2 workers "would inject additional collateral or extrinsic issues into this litigation" and that the H-2 workers "would be able to have their own rights determined in an original action of their own."

[4]As pointed out *infra*, the district court's assertions that the FLCRA claims were contained in the original counterclaim were simply wrong.

[5]The intervenors and the federal defendants appealed to the Fifth Circuit from Judge Sessions' order granting injunctive relief. The Fifth Circuit dismissed the appeals as moot on May 23, 1980 and remanded for further proceedings.

Judge Hudspeth cited as one of the reasons for granting the motion that ". . . the counterclaims are directed at one party, the growers' association, rather than the separate grower employers who had separate employment relationships with their individual employees." On August 24, 1981, the intervenors filed a motion to transfer the case to the Pecos Division. In support of their motion to transfer, intervenors noted that they ". . . alleged various violations by the Defendant Association of the statute and regulations governing the employment of workers under the H-2 visa program" and that "the only parties who still have an interest are the Association and the intervenors." On March 3, 1982, Judge Hudspeth dismissed the federal defendants and ordered the remaining cause transferred to the Pecos Division.

On December 27, 1982, almost 10 months after the case was transferred to the Pecos Division, more than 53 months after the original counterclaim was filed, and more than 21 months after Judge Hudspeth had declared that the counterclaims were directed only against the Association, the intervenors filed a motion to ". . . amend their counterclaim to: . . . (c) add a claim under the Farm Labor Contractor Registration Act; and (d) join the members of the Plaintiff Association as counterclaim Defendants." The amended counterclaim added 27 individual growers as counterclaim defendants, even though the two H-2 worker counterclaim plaintiffs had worked for only two of the 27 individual growers. The amended counterclaim also added a cause of action alleging eight violations of FLCRA by the Association and two separate violations of FLCRA by the individual growers.[6] On the same day, intervenors filed a

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[6]As the court of appeals recognized, "FLCRA provides separate sets of obligations for contractors and growers." Appendix D, at A-32. The individual growers were charged with dealing with an unregistered farm labor contractor, *i.e.*, the Association, in violation of 7 U.S.C. § 2043 (c), and with failing to maintain payroll records, in violation of 7 U.S.C. § 2050c. A grower had a legal duty to maintain payroll records for only

motion to certify the cause as a class action under Rule 23 (b) (3).[7]

Following denial of class certification, approximately 330 Mexican workers intervened in the case.[8] The individual growers, who were not served until July, 1983, filed an answer on August 17, 1983 in which they raised the statute of limitations defense and filed a motion for summary judgment on September 26, 1983 in which they contended that any cause of action against them was barred by the statute of limitations.[9]

Trial was held in Pecos, Texas on October 10-12, 1983,[10]

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three years. FLCRA was silent on the question of how long the grower had to maintain the payroll records, but the Fair Labor Standards Act required a grower to maintain such records only for three years. 29 C.F.R. § 516.5 *See also* 20 C.F.R. § 655.202 (b) (7) (iv) (1977).

[7]Local Rule 300-5 (k) provided that "when a class action allegation is set forth in the original complaint, the plaintiff is directed to file within 90 days a motion for class certification." Intervenors filed their motion approximately four years late, despite several reminders from the district court. The district court cited the workers' failure to comply with the 90-day rule as a major reason for denying class certification on April 2, 1983.

[8]No U.S. workers attempted to intervene after class certification was denied, and no evidence was ever presented with regard to the two U.S. workers who were the original intervenors in the case (and, in fact, the only counterclaim plaintiffs in the case until Judge Hudspeth approved joinder of the two H-2 workers on March 18, 1981) or with regard to any U.S. workers who worked in the Presidio Valley in 1978-79.

[9]The district court erroneously held that the statute of limitations was four years. Appendix A, at A-19. In a companion case involving similar issues, *Salazar-Calderon v. Presidio Valley Farmers Association*, 765 F.2d 1334 (5th Cir. 1985), the court of appeals affirmed the district court's determination that the applicable statute of limitations was two years rather than four years. *Id.* at 1351. Even a four-year limitations period would have barred all the 330 H-2 workers admitted on the 70-day visas, which expired in July, 1978.

[10]Only six H-2 workers testified at the trial, and they worked for only three growers between them. The district court relied on the interrogatory answers of the other H-2 workers in making its findings, a procedure the court of appeals held to be reversible error. Appendix D, at A-30. *See also Salazar-Calderon v. Presidio Valley Farmers Association*, 765 F.2d 1334, 1349 (5th Cir. 1985).

and the district court, per Judge Bunton, issued its memorandum opinion on April 16, 1984. Judge Bunton found that the Association had acted as a farm labor contractor and had violated eight provisions of FLCRA.[11] Judge Bunton also ruled that the class action had tolled the statute of limitations and that the amended counterclaim filed on December 27, 1982 related back to the date of the original counterclaim filed on July 17, 1978 with respect to the individual growers.[12] Judge Bunton then concluded that "the individual dues paying members of PVFA were jointly responsible for the statutory damages resulting from [the FLCRA] violations" of the Association, although he did not provide any explanation for imposing joint liability on the individual growers.[13] The entire judgment was based on FLCRA.

Both the workers and the growers appealed from the district court's decision. Among other issues, the individual growers argued that the district court had erred in allowing the amended counterclaim to relate back against them and that the district court had erred in imposing joint and several liability on them for the alleged FLCRA violations of the incorporated Association.

The court of appeals agreed that the district court had erred in imposing joint and several liability on the individual growers for the Association's FLCRA violations.[14] The court of appeals noted that "[b]ecause [the Association] was the only farm labor contractor in this case, to the extent the damages the district court awarded were based on violations of the FLCRA which could have been committed only by a farm labor contractor, the individual growers cannot be held responsible for them."[15] With respect to the growers' relation

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[11]Appendix A, at A-4 and A-17.

[12]Appendix A, at A-19 and A-21.

[13]Appendix A, at A-22.

[14]Appendix D, at A-31.

[15]Appendix D, at A-31.

back argument, the court of appeals noted that "[i]n December, 1982 the [district] court granted the workers leave to amend their counterclaim to allege violations of FLCRA and add as defendants [the Association's] member growers."[16] The court of appeals remarked that "[t]he [district] court rejected defendants' complaints that the workers should not have been permitted to amend their counterclaim to add the individual growers as defendants" but merely noted, in a one sentence footnote, that "[w]e conclude that the district court was within its discretion in permitting intervenors to so amend their counterclaim under Fed.R.Civ.P. 15(c)."[17] Despite the fact that the workers had not appealed from the district court's failure to find that the individual growers had violated FLCRA in their individual capacities or to award separate damages for any such violations by the individual growers,[18] the court of appeals nevertheless held that, on remand, the workers could still pursue two FLCRA claims against the individual growers.[19]

REASONS FOR GRANTING THE WRIT

I. The Decision Of The District Court And Court Of Appeals To Extend The Class Action Tolling Rule Of *American Pipe & Construction Co.* To Persons Not Named As Defendants In The Original Counterclaim With Respect To Claims Not Contained In The Original Counterclaim Conflicts With Decisions Of This Court And Decisions Of Other Circuits.

[16]Appendix D, at A-28.

[17]Appendix D, at A-30 and A-31 n. 6.

[18]The workers, in contrast, did appeal from the district court's failure to find that the Association had violated 7 U.S.C. § 2044 (b) (2) (knowingly giving false and misleading information concerning terms and conditions of employment), but the court of appeals rejected this argument, noting that ". . . we are not persuaded that the record could support a finding that defendants made such statements." Appendix D, at A-29 n. 4.

[19]Appendix D, at A-34.

The district court declared in its memorandum opinion that "[s]ince this pending class certification was not ruled upon and denied until April 3, 1983, the statute of limitations was tolled as to all members of the prospective class who now seek relief in intervention in this action . . . As such, the statute of limitations cannot now be employed as a bar to the farmworkers seeking monetary relief in this action."[20] The district court's decision to extend the tolling rule of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), to individual growers who were not named as defendants in the original counterclaim[21] and to the FLCRA claims which were not contained in the original counterclaim[22] conflicts with decisions of this Court and with decisions of other circuit courts.

Justice Powell has observed that "the tolling rule [in class actions] is a generous one, inviting abuse." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983) (Powell, J., concurring opinion). In *Johnson v. Railway Express Agency*, 421 U.S. 454, 467 (1975), the Court emphasized that ". . . the tolling effect given to the timely prior filings in *American Pipe* and in **Burnett** depended heavily on the fact that those filings involved *exactly the same cause of*

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[20]Appendix A, at A-19.

[21]The district court correctly acknowledged that the individual growers were not named as counterclaim defendants until the amended counterclaim was filed on December 27, 1982. Appendix A, at A-19. Likewise, the court of appeals recognized that the individual growers were first named defendants by the amended counterclaim. Appendix D, at A-28.

[22]The district court erroneously assumed that the FLCRA claims were contained in the original counterclaim, twice referring to the "alleged FLCRA violations" in the original counterclaim. Appendix A, at A-2 and A-18. Even the workers conceded in their brief to the court of appeals that FLCRA causes of action were not added until they filed their counterclaim amendment. Brief for Appellants, at 5. The court of appeals correctly observed that the FLCRA claims were first added by the amended counterclaim in December, 1982. Appendix D, at A-28.

action subsequently asserted. This factor was more than a mere abstract or theoretical consideration because the prior filing in each case necessarily operated to avoid the evil against which the statute of limitations was designed to protect." (Emphasis added.) The Court went on to note that "[o]nly where there is complete identity of the causes of action will the protections [against the running of the statute of limitations] suggested by petitioner necessarily exist." *Id.* at 468 n. 14. In *Johnson*, the plaintiff had argued that the filing of a Title VII cause of action had tolled the limitations on his Section 1981 cause of action. The Court noted that "[p]etitioner freely concedes that he could have filed his section 1981 action at any time after his cause of action accrued . . . Thus, in a very real sense, petitioner has slept on his section 1981 rights. The fact that his slumber may have been induced by faith in the adequacy of his Title VII remedy is of little relevance inasmuch as the two remedies are truly independent . . . *We find no policy reason that excuses petitioner's failure to take the minimal steps necessary to preserve each claim independently.*"[23] *Id.* at 466. (Emphasis added.)

A more egregious abuse of the class action tolling rule than the district court's application of that rule to claims not asserted in the original counterclaim was the district court's conclusion that the class action tolled the statute of limitations with respect to the individual growers who were not even named as defendants in the original counterclaim. The district court's interpretation of *American Pipe*

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[23]Similarly, Justice Powell stated in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983) (Powell, J., concurring opinion), that "[t]he [class action tolling] rule should not be read, however, as leaving a plaintiff to raise different or peripheral claims following denial of class status . . . It is important to make certain, however, that *American Pipe* is not abused by the assertion of claims that differ from those raised in the original class suit . . . Claims to which the defendant was not fairly placed on notice by the class suit are not protected under *American Pipe* and are barred by the statute of limitations."

in this regard certainly appears to be contrary to the positions taken by this Court and clearly conflicts with the decisions of other circuits. The Court's holding in *Johnson v. Railway Express Agency* that the class action tolling rule requires the assertion of "exactly the same cause of action" certainly implies that those exact same claims must be asserted against the same parties named in the original pleading. That requirement is also implicit in *American Pipe* where the Court observed that "the policies of ensuring essential fairness to defendants and of barring a plaintiff who 'has slept on his rights,' . . . are satisfied when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby *notifies the defendants* . . . of the substantive claims being brought against them. . . ." 414 U.S. at 554-55. (Emphasis added.) If no policy reason excuses a class plaintiff's failure to preserve each claim independently, as the Court held in *Johnson v. Railway Express Agency*, the same could be said with greater force about a class plaintiff's failure to name the defendants he wishes to sue.

The Second Circuit in *Arneil v. Ramsay*, 550 F.2d 774 (2d Cir. 1977), refused to apply the class action tolling rule to persons who were not named in the original complaint. The Second Circuit held that a class action suit brought against a member firm of the New York Stock Exchange did not toll the statute of limitations against the Exchange and certain former officials of the firm. The Second Circuit stated that

> [p]laintiffs contend that the statute was tolled as to all defendants. However, nothing in *American Pipe* suggests that the statute be suspended from running in favor of a person not named as a defendant in the class suit, and we decline to extend the rule. A different conclusion would not comport with reason.

Id. at 782 n. 10. Similarly, in *Wachovia Bank and Trust Co. v. Nat'l Student Marketing*, 461 F. Supp. 999 (D.D.C. 1978),

aff'd, 650 F.2d 342 (D.C. Cir.), *cert. denied*, 452 U.S. 954 (1980), the district court refused to apply the tolling rule against certain individual defendants not named in the original complaint. The individual defendants, Natelli and Scansaroli, were accountants for another defendant, the accounting firm of Peat, Marwick & Mitchell. The district court stated that, ". . . the doctrine cannot operate against defendants Natelli and Scansaroli. Since they were not named in the original New York actions, they cannot fairly be charged with the notice requisite for class action tolling." 461 F.Supp. at 1011.

The district court's extension of the class action tolling rule to a cause of action not contained in the original counterclaim clearly conflicts with earlier decisions of this Court, and its extension of the tolling rule to persons not named as defendants in the original counterclaim conflicts with decisions of the Second Circuit and the District of Columbia Circuit and, by implication, with decisions of this Court. In each instance, the district court's decision constituted an unwarranted extension of the class action tolling rule well beyond the narrow confines articulated by this Court.

II. The Decision Of The District Court And The Court Of Appeals Allowing A Counterclaim Amendment To Relate Back Against Newly Added Defendants Conflicts With Decisions Of Other Circuits And Numerous District Courts Regarding The Proper Scope Of Fed. R. Civ.P. 15 (C).

Fed.R.Civ.P. 15(c) provides that "an amendment changing the party against whom a claim is asserted" relates back only where (1) the claim arose out of conduct, transactions or occurrences set forth in the original pleading, (2) the person sought to be brought in had such notice of the institution of the suit that it would not be prejudiced in maintaining his defense on the merits, and (3) the party sought to be brought in "knew or should have known that, *but for a mistake concerning the identity of the proper party*, the action would have been brought against him." (Emphasis

added.) The district court determined that, pursuant to Fed.R.Civ.P. 15(c),[24] the counterclaim amendment related back to the date of the original counterclaim against the individual growers even though they were not added as defendants until the counterclaim amendment was filed and the claims asserted against them were separate and distinct from the claims asserted against the Association. The district court's interpretation of the "mistake concerning the identity of the proper party" requirement of Rule 15(c) (2) so as to permit relation back of newly added claims against newly added defendants, where there was no mistake concerning the identity of the original counterclaim defendant, conflicts with decisions of other circuits and numerous district courts.[25]

In this case, the district court did not even find that there was a "mistake concerning the identity of the proper party," as required by Rule 15(c) (2), but merely found that the workers' mistake in failing to name the individual growers was "excusable error."[26] Any mistake made by the workers certainly did not concern the "identity of the proper party" since there was no dispute that the incorporated Association was a proper party for the workers to sue. The workers continued to assert claims against the Association even after the counterclaim was amended. In fact, the amended counterclaim asserted separate and distinct FLCRA claims against the Association, the only alleged farm labor

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[24]The district court did not explain why it felt it necessary to rely on Fed.R.Civ.P. 15(c) after determining that the class action had tolled the statute of limitations with respect to the individual growers. If the statute of limitations were tolled, there was no need for relation back. Neither the district court nor the court of appeals addressed the issue of whether Rule 15(c) relation back may be used to evade the limitations imposed upon class action tolling.

[25]Petitioners take the position that the Court does not have to reach this issue if it determines that the class action tolling rule did not toll the statute of limitations with respect to the individual growers.

[26]Appendix A, at A-21.

contractor in the case, and against the individual growers, the alleged users of the alleged farm labor contractor. The district court's judgment was based entirely on the Association's alleged violations of FLCRA.

The Seventh Circuit has taken the position that Rule 15(c) applies only to corrections of misnomers and that "Rule 15(c) (2) permits an amendment to relate back only where there has been an error concerning the identity of the proper party and where that party is chargeable with knowledge of the mistake, but it does not permit relation back where, as here, there is lack of knowledge of the proper party." *Wood v. Worachek*, 618 F.2d 1225, 1230 (7th Cir. 1980); *see also Norton v. International Harvester Co.*, 627 F.2d 18 (7th Cir. 1980); *Simmons v. Fenton*, 480 F.2d 133, 136-37 (7th Cir. 1973). The position of the Seventh Circuit has been taken by other circuits and numerous district courts, as well. *See Gridley v. Cunningham*, 550 F.2d 551, 553 (8th Cir. 1977) ("There was no mistake in the identity of the proper party in the contract action. The amendment added a new cause of action in which Cunningham was a proper defendant. There was no reason for Cunningham to know from the contract action against the corporation that he would be named a defendant in a fraud action."); *Russ v. Ratleff*, 578 F.2d 221 (8th Cir. 1978), *cert. denied*, 439 U.S. 1003 (1978); *Archuleta v. Duffy's Inc.*, 471 F.2d 33, 35 (10th Cir. 1973); *Hernadez Jimenez v. Calero Toledo*, 640 F.2d 99, 103 (1st Cir. 1979); *Kaminski v. Metropolitan Life Ins. Co.*, 586 F.Supp. 384, 387 (S.D.N.Y. 1984) ("Plaintiff made no mistake in suing Metropolitan on the claim asserted in her original complaint. Metropolitan was the only party liable on the certificate of insurance. Plaintiff now seeks to assert a different claim against the added party. While in hindsight, it may have been wiser for plaintiff to have included General Motors and the new allegations in her original pleading, Rule 15(c) (2) does not intend to insulate plaintiffs from the consequences of their tactical errors."); *Rogatz v. Hospital General San Carlos*, 89 F.R.D. 298, 300-01 (D.P.R. 1980) ("This is not a case involving a misnomer of

defendant which Rule 15(c) was envisioned to correct."); *Francis v. Pan American Trinadad Oil Company*, 392 F.Supp. 1252, 1259 (D.Del. 1975); *Slack v. Treadway Inn of Lake Harmony, Inc.*, 388 F.Supp. 15, 20-21 (M.D.Pa. 1974); *Williams v. Dana Corporation*, 54 F.R.D. 473, 474 (E.D.Mich. 1971); *King & King Enterprises v. Champlin Petroleum Co.*, 446 F.Supp. 906, 908-10 (E.D.Okla. 1978).

Even the Fifth Circuit has expressed the same restrictive view of Rule 15(c) in other cases. *See Kerney v. Fort Griffin Fandangle Ass'n., Inc.*, 624 F.2d 717, 721 (5th Cir. 1980) (permitting relation back where "the amended complaint named no parties whom the original complaint had not named"); *Marks v. Prattco, Inc.*, 607 F.2d 1153 (5th Cir. 1979) (allowing relation back not noting that "this is not a case where the plaintiff by amending the complaint, seeks to substitute a new defendant"); *Shelley v. Bayou Metals*, 561 F.2d 1209, 1210 (5th Cir. 1977) ("... Rule [15(c)] applies to corrections of misnomers and misdescriptions of a defendant."); *Longbottom v. Swaby*, 397 F.2d 45, 48 (5th Cir. 1968) ("... Rule 15(c) does not apply to an amendment which substitutes a new party or parties.").

The district court offered no explanation why the unnamed individual growers should have considered themselves parties to the counterclaim when the judge handling the case previously had expressly stated, nearly two years before the counterclaim was amended, that the counterclaim was directed only at the Association and not the individual growers. The district court based its relation back decision on an expansive view of Rule 15(c) that has been rejected by an overwhelming number of courts.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 25, 1985

APPENDIX A

Memorandum Opinion Of The United States District Court For The Western District Of Texas, Pecos Division

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

CIVIL ACTION No. P-82-CA-15

PRESIDIO VALLEY FARMERS ASSOCIATION, *et al.*

v.

ANTONIO MONTELONGO, *et al.*

MEMORANDUM OPINION

In this highly convoluted action, a group of Mexican national farmworkers, as Intervenor/Counter-Claim Plaintiffs, seek to recover statutory money damages from an agricultural association incorporated under the nonprofit corporation laws of the State of Texas and its members for various and sundry violations of 7 U.S.C. § § 2041, *et. seq.* (now repealed), the Farm Labor Contractor Registration Act (FLCRA). Based upon a thorough review of the volumes of pleadings and briefs filed by the parties in this action, the controlling legal authorities, and the evidence presented to this Court by the parties, both at a hearing held during the week of September 22, 1983 and the proof offered in support of their respective Motions for Summary Judgment, this Court enters the following Findings of Fact and Conclusions of law in memorandum form.

I.

(A) *THE NATURE OF THIS ACTION*

In the spring of 1978, the PRESIDIO VALLEY FARMERS ASSOCIATION (PVFA), an agricultural association in-

corporated under the nonprofit corporation laws of the State of Texas, petitioned the Commissioner of the Immigration and Naturalization Service (INS) to issue temporary non-immigrant agricultural worker visas (H-2 visas) to a group of Mexican national farmworkers so that the farmworkers could legally labor on PVFA's dues paying members' farms in the Presidio Valley of Southwest Texas during the 1978-79 growing season. In its petition to the federal court, PVFA promised to comply with all federal and state laws in its employment of the farmworkers. From that promise, this action arises.

On or about May 18, 1978, the United States District Court, El Paso Division, granted PVFA its requested temporary injunctive relief and ordered the INS to issue the requested H-2 visas. Several months later, on or about July 13, 1978, two individuals intervened into that original pending action on behalf of all the other H-2 workers employed by PVFA and its members and complained of PVFA's (as counterclaim defendants) violations of FLCRA. In the original complaint filed in intervention by the two farmworkers, the H-2 workers sought money damages for the alleged FLCRA violations solely from PVFA in its representative capacity. Approximately 56 months later, after this cause had been recently transferred onto this Court's docket, the farmworkers amended their complaint to state additional causes of action against the individual members of PVFA for the various and sundry violations of FLCRA. As such, the farmworkers, having waived any claim to actual damages, now seek statutory money damages from both PVFA and its dues paying members for the alleged violations of FLCRA.[1]

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[1]Throughout this opinion references shall be made to the parties from whom relief is sought by the farmworkers. These parties are, of course, the PVFA, an agricultural association incorporated under the nonprofit corporation laws of the State of Texas, and the dues paying membership of PVFA. All references to these party counterclaim Defendants shall be made solely as PVFA. Whenever this Court employs the term PVFA, unless otherwise noted, this Court refers to both the association itself and the membership of the association.

(B) *THE LEGAL BASIS OF THIS ACTION*

The Farm Labor Contractor Registration Act, 7 U.S.C. § § 2041, *et. seq.*, was enacted by Congress in 1963 to correct abuses "by certain irresponsible [persons who contract] for the services of the migrant agricultural laborers [and] who exploit producers of agricultural products, migrant agricultural laborers, and the public generally." *Id.* § 2041(a). Such legislation, as it is with all modern Congressional action, was enacted to remove any "impediments, obstructions, and restraints occasioned to the flow of the interstate commerce by [such] activities." *Id.* § 2041(b).

In essence, the Act and regulations promulgated thereunder mandate that "any person, who, for a fee, either for himself or on behalf of another person, recruits, solicits, hires, furnishes, or transports ten or more migrant workers at any one time in any calendar year for interstate agricultural employment," *Id.* § 2041(b), must:

(1) register as a farm labor contractor:

(2) fully disclose to each worker at the time of his or her hiring:

(a) the geographical area of the farmworker's employment;

(b) the crops he or she is hired to labor upon;

(c) the transportation, housing, and insurance to be furnished to the farmworker;

(d) the wage rate to be paid for the services rendered by the farmworker; and

(e) the charges of fees to be deducted from the farmworker's wages for the services rendered by the farm labor contractor;

(3) conspicuously post a written statement of the terms and conditions of the employment agreement;

(4) keep and maintain adequate and complete records of all wages paid to the laborers, and fairly itemize all deductions legally withheld from their wages; and

(5) provide free tools for the laborers' use.

Id. § 2045; 20 C.F.R. § 655.202.

In order to promote compliance with this statute and further the purposes of this remedial legislation, Congress granted to the Courts of the United States the authority to "award damages up to and including an amount equal to the amount of actual damages, or $500.00 for each violation," if the court determines that a Defendant "intentionally violated any provision of this chapter or any regulation prescribed thereunder." *Id.* § 2050a(b).

II.

Having set forth the relevant, basic facts and the controlling statute, this Court must now address the matters in dispute in this cause. Such dispositive issues are:

(1) was PVFA a farm labor contractor bound by FLCRA during the 1978-79 growing season;

(2) if so, did PVFA breach any statutory duty imposed by FLCRA during that growing season;

(3) if so, what dollar amount should be awarded to the farmworkers for these violations; and

(4) if so, who should pay these damages, the nonprofit corporation, PVFA, or the individual dues paying members of the association?

Because of the contingent nature of these inquiries, each shall be discussed in the order presented.

(A) *PVFA WAS A FARM LABOR CONTRACTOR*

The primary focus of this Court's inspection into the threshold issue of whether PVFA was a farm labor contractor as contemplated in the terms of FLCRA is the purpose of the association and its actual activities during the season in issue.

An examination of the nonprofit agricultural association's articles of incorporation adopted in the fall of 1977 clearly

reveal that the primary purpose of the association was "to contract for migrant labor for the use of its members." In so doing this task, the association appointed one of its members to become the association's "labor procurement director" and conducted various recruiting activities aimed at securing workers for its dues paying members. Such activities consisted of placing radio advertisements on Mexican national radio stations and placing newspapers advertisements in newspapers throughout both sides of the international border. As mentioned previously, PVFA also successfully petitioned the Government for the issuance of temporary nonimmigrant agricultural worker visas for the Mexican national farmworkers. All of these contracting and recruiting activities were paid out of the dues paid by the members of the association. Such activities clearly appear to be within that contemplated by Congress in regulating the farm labor market. Accordingly, this Court is of the opinion that PVFA operated as a farm labor contractor during the 1978-79 growing season. *See* 7 U.S.C. § 2041(b); *Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983).

It also appears that PVFA was universally informed of the various duties imposed by the regulations promulgated under FLCRA and the H-2 visa program (which program demanded PVFA's compliance with all federal laws such as FLCRA) in communications had between PVFA and the government agencies administering the program before the actual issuance of the visas. The evidence also shows that the federal court ordered PVFA to comply with the various regulations—20 C.F.R. § 655.202 in particular—when it granted the association's petition for the issuance of the H-2 visas.

It appears patently clear that PVFA is estopped from contesting its status as a farm labor contractor during the 1978-79 growing season in light of the facts recited above. To do otherwise would be to ignore the congressional mandate expressed in FLCRA. *See Soliz v. Plunkett*, 615 F.2d 272 (5th Cir. 1980); *Marshall v. Coastal Growers Association*, 598 F.2d 521 (9th Cir. 1979).

(B) *THE STATUTORY AND REGULATORY DUTIES IMPOSED*

Having determined the PVFA was a farm labor contractor bound by the duties mandated by FLCRA, this Court must now determine which of those various duties were breached by PVFA in their agricultural operations during the 1978-79 growing season.

Initially this Court is mindful of the fact that PVFA freely admits that it:

(1) failed to register as a farm labor contractor as required by 7 U.S.C. § 2043(a);

(2) failed to make written disclosures to the workers, and failed to provide written contracts to the workers as required by 7 U.S.C. § 2045(b) and 20 C.F.R. 655.202 (b)(14); and

(3) failed to post the written terms of employment in the farm fields as required by 7 U.S.C. § 2045(c).

The evidence presented also shows that all but two of the members of the association have either "lost" or "misplaced" their wage records for the growing season in issue. As to the two sets of records actually kept by any of the members of the association, this Court finds that at best those records are incomplete, and at worst patently falsified. The evidence also shows that the members of the association made absolutely no attempt to provide the farmworkers with accurate and complete wage receipts as required by 7 U.S.C. § 2045(c) and 20 C.F.R. § 655.202(b)(8).

As to the wages actually paid to the piece rate workers, who are the vast majority of the farmworkers, this Court is firmly of the opinion that the association's members universally failed to pay the farmworkers the required minimum wage of $2.97 an hour. It appears that the farmworkers who did the onerous and backbreaking piece rate labor of transplanting and setting onions often received less than $1.00 an hour. The evidence also shows that the piece rate laborers who toiled on the chili and melon crops fared no better.

The largest affront to the law with regard to wages paid to the farmworkers appears to be that the federal court, which had originally granted PVFA's petition for the issuance of the visas on the condition that legal wages be paid to the farmworkers by PVFA, had to later order the association and its members to pay the hourly wages previously promised in the petitioning process. Such clearly tries the patience of this Court.

The evidence also shows that the association and its members failed to some extent to provide the laborers with free tools in violation of 20 C.F.R. § 655.202(d). Nor does it appear that the association and its members paid the farmworkers the $8.00 per week transportation allowance promised the government in PVFA's petition for the issuance of the visas. Nor does it appear that the association and its members paid the farmworkers who journeyed into the area to work from outside of the Presidio/Ojinaga area either their transportation costs or the promised $5.00 per day housing allowance. Not only were these payments promised by PVFA during the course of the petitioning process, but such, being required by 20 C.F.R. § 655.502 (b) (2), (5), were also ordered paid by the federal court.

In reviewing the damning evidence presented, it appears that PVFA *intentionally* and *knowingly* ignored virtually every applicable rule, regulation, and provision of FLCRA in its employing the Mexican national farmworkers through the H-2 nonimmigrant agricultural worker program during the 1978-79 growing season.

(C) *CONSIDERATIONS IN AWARDING STATUTORY DAMAGES*

Although this Court is mindful that Congress has entrusted it with the broad discretionary grant of determining and affixing statutory damages in an action brought under FLCRA, this Court is of the opinion that it is undoubtedly wiser to set out in brief detail the reasons and foundations of such purely discretionary action.

(i) *THE CONTROLLING LAW, THE FARM LABOR CONTRACTOR REGISTRATION ACT, HAS BEEN REPEALED BY CONGRESS*

Initially this Court is mindful of the startling fact that the law under which PVFA stands liable has been repealed by Congress and replaced with legislation which, if in effect at the time of the actions the basis of this cause, would now most likely exempt PVFA from its grasp and exclude the H-2 farmworkers from its protection.[2]

On January 14, 1983, Congress exacted the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § § 1801-1872. This new law, MASAWPA, which repealed the law under which PVFA stands liable, FLCRA, expressly excludes such "an agricultural employer, agricultural association, or employee of an agricultural employer or agricultural association" from its effect. *Id.* § 1802(7). As such, PVFA, if sued under the present law, arguably would not be liable to the farmworkers for the damages sought in this action.[3]

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[2]On or about September 1, 1982, the Secretary of Labor transmitted a bill entitled "the Migrant and Seasonal Agricultural Worker Protection Act." The House Subcommittee on Labor Standards held a hearing on the bill, H.R. 7102, on September 14, 1982. The Committee on Education and Labor reported out the bill from committee unanimously on September 28, 1982, H. Rep. No. 97-885, reprinted at 1982 U.S. Cong. Adm. News 4547. The House passed the bill on September 29, 1982. 128 Cong. Rec. H7907 (Sept. 29, 1982). The Senate unanimously passed the bill on December 19, 1982, with the minor change of the effective date of the legislation. 128 Cong. Rec. § 15568 (Dec. 19, 1982). The House agreed to such a change. 128 Cong. Rec. H10456 (Dec. 20, 1982).

[3]It is clear that before the enacting of MASAWPA the general rule was that not-for-profit agricultural organizations such as PVFA was bound by the dictates of FLCRA. *See Marshall v. Coastal Growers Association*, 598 F.2d 521 (9th Cir. 1979), in which the Ninth Circuit found:

> Those who have created a corporation as an advantageous means of serving their business interests cannot then disregard that

In viewing the new law, the Court finds that the farmworkers themselves are excluded from coverage under MASAWPA by the provisions of 29 U.S.C. § 1802(6), (8)(B)(iii), (10)(B)(iii) which exclude "any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under § § 1101(a)(15)(H)(ii) [H-2 farmworkers] and 1184 of Title 8." It is undisputed that the farmworkers are "temporary nonimmigrant aliens" admitted into this Country as H-2 farmworkers. As such, it is only rudimentary to state that they would be excluded under the operation of MASAWPA from recovering money damages in this action.[4]

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corporate entity in order to avoid statutory obligations formulated for the public's protection. *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946).

The Court then continued to find that such an agricultural association was in fact a farm labor contractor and liable under the Act. *See Soliz v. Plunkett*, 615 F.2d 272 (5th Cir. 1980).

It is also clear that PVFA bears the burden of establishing its entitlement to any exemption or exclusion of its agricultural association from the terms and conditions of FLCRA. Since the Act is remedial, any exemption or exclusion is to be construed narrowly and PVFA bear the burden of establishing that its activities are "plainly and unmistakenly within the terms and spirit" of any exemption or exclusion claimed in the action. *De La Fuente v. Stokley-Van Camp, Inc.*, 713 F.2d 225, 234 (7th Cir. 1983); *Donovan v. Heringer Ranches, Inc.*, 650 F.2d 1152, 1154 (9th Cir. 1983); *Soliz v. Plunkett, supra*, 615 F.2d at 272; *Marshall v. Coastal Growers Association*, 598 F.2d 521 (9th Cir. 1979).

[4]An examination of the hearing record before the Subcommittee on Labor Standards of the House Committee on Education and Labor, 97th Cong., 2d Sess. (Sept. 14, 1982), at 52, reveals that the Representative of the Department of Labor, believing that farmworkers were excluded from the protection of FLCRA, stated that:

> The exemption which is currently in FLCRA pertaining to H-2's [nonimmigrant alien laborers such as Plaintiffs] and the exemption which is carried over into MASAWPA concerning H-2's provides no exemption for anyone except the individual who has come into the country legally under the H-2 program.

A further examination of the House Committee on Education and Labor's Report reveals that not only did Congress believe that it had continued

A further review of the Congressional intent shows that Congress enacted into law in MASAWPA what it believed was the actual purpose and intent of FLCRA—the curing of abuses in the farmworker labor market. It is very revealing to find that Congress has recently chosen to narrow the focus of the remedial legislation and exclude the parties to this action from its protection.[5]

(ii) *THE SUBSTANTIVE IMPACT UPON EACH FARMWORKER*

Since the primary goal of this Court in this action is to fairly and justly resolve this dispute, and in so doing award the farmworkers an amount of money damages which "fairly and equitably compensate the workers for [PVFA's] actions . . . [without being] excessive," *De La Fuente v. Stokley-Van Camp, Inc.*, 713 F.2d 225, 240 (7th Cir. 1983), this Court must determine the substantive impact upon each farmworker caused by each violation. This is not meant in any way to limit the amount of the awarded damages to the amount of actual damages suffered by the farmworkers, *Castillo v. Givens, supra*, 704 F.2d at 197 n.37 (5th Cir. 1983), *citing with approval, Alvarez v. Joan of Arc*, 658 F.2d 1217, 1224 (7th Cir. 1981) (no need to prove actual damages to

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to exclude nonimmigrant foreign laborers from the workings of MASAWPA as it erroneously believed that it had done under FLCRA, H. Rep. No. 97-885, reprinted at 1982 U.S. Code Cong. Adm. News, at 4554, but also that it had intentionally exempted agricultural ventures such as PVFA from the workings of the new law because of unwanted ramifications caused by Congress' previous failure to so exempt them from the workings of FLCRA. *Id.* at 4549. Especially revealing is the Chairman of the Senate Labor Committee's speech made on the floor of the Senate shortly before its unanimous passage. 128 Cong. Rec. S15561 (Dec. 19, 1982).

[5]This Court also notes that it is fully aware of the impact of 1 U.S.C. § 109 on this action and its mandate that the repeal of FLCRA should have no impact on the bringing of this action. This Court only views MASAWPA to fully determine the actual legislative intent and purpose to be served in this action.

obtain statutory damages); *see also Espinoza v. Stokley-Van Camp. Inc.*, 641 F.2d 535, 538-39 (7th Cir. 1981) (authority therein, but modified by a later holding in *Alvarez v. Joan of Arc, supra)*, but instead to insure that Plaintiffs receive an amount which is not harshly and unrealistically based upon technical noncompliance. *See Alvarez v. Longboy*, 697 F.2d 1333, 1341 (9th Cir. 1983) (Court may deny any award of damages if actions were accidental, innocent, or merely negligent . . . damages are mandated only when actions are irresponsible and they "exploit producers of agricultural products, migrant agricultural laborers, and the public generally"—7 U.S.C. § 2041).

(iii) *WAS THE VIOLATION INTENTIONAL OR INADVERTENT?*

Since this Court may award statutory damages only for intentional violations of the Act, this Court must determine whether the violations were "conscious or deliberate." However, no proof (although offered in this cause) need be offered of any specific intent to ignore and violate the Act; the farmworkers need only show that the violations were the natural and foreseeable consequence of their intentional acts. *Castillo v. Givens, supra*, 704 F.2d at 197; *Alvarez v. Longboy, supra*, 697 F.2d at 1341; *Alvarez v. Joan of Arc, supra*, 658 F.2d at 1224.

(iv) *THE IMPACT UPON THE PUBLIC INTEREST*

Section 2041(a) of the Act directs this Court that the remedial purpose of the Act is to protect the interest of the general public from the abuses suffered by it at the hands of "irresponsible" persons trading in the marketplace of agricultural labor. Since this Court does not operate in an academic vacuum separated from the casual impact of its decisions, this court must recognize the actual impact upon the public interest of not only PVFA's intentional violations of federal law, but also the impact on the general interest of the amounts awarded as statutory damages.

(D) *THE AWARD OF MONEY DAMAGES*

Having set forth this court's general considerations in

awarding the statutory money damages to the farmworkers for PVFA's violations of federal statute and regulations promulgated thereunder, this Court must now consider each violation and establish a dollar amount to be awarded for each violation. For clarity, the statutory violations are set forth below and discussed separately in light of the considerations expressed previously within this opinion. The violations are:

(1) failure to register as a farm labor contractor;

(2) failure to provide written disclosures and a written contract of employment to each farmworker;

(3) failure to post the conditions of employment in the farm fields;

(4) failure to keep adequate and complete wage records and failure to provide wage receipts to each farmworker;

(5) failure to comply with the conditions of the work agreement (insurance, wages paid, tools supplied, etc.);

(6) failure to pay housing expenses to those who journeyed into the area to work from outside of the Presidio/Ojinaga area; and

(7) failure to pay transportation expenses to those who journeyed into the area to work from outside the Presidio/Ojinaga area.

For the purpose of this Memorandum Opinion, PVFA's various violations have been grouped into two sections labeled Technical Violations and Substantive Violations. This Court must stress that it does not wish to minimize PVFA's actions by labeling some of those actions as Technical Violations; however, in order to set forth this complex and convoluted set of facts in a reasonably comprehensible fashion, this Court employs this device with the hope that no person will employ semantic sport to thwart the clear intent of this Court.

(i) *TECHNICAL VIOLATIONS*

(1) *FAILURE TO REGISTER*

This Court is mindful that the statutory requirement of registration serves a most useful purpose since to know those bound by the law is certainly to some extent control over those so bound. However, since such admitted failure had little real impact upon either the farmworkers or the general public in this action, this Court believes such failure amounts to little more than a technical noncompliance with a law which has been subsequently changed and modified to most likely exclude such actions from this forum.

Although this Court in no manner condones PVFA's failure to comply with a law they *unbelievably* claim they had no knowledge of, this Court is aware of the realities of the situation. Accordingly, the sum of FIFTEEN and no/100 Dollars ($15.00) is established as the amount of statutory money damages assessed for each violation as to each farmworker for PVFA's failure to register as a farm labor contractor.

(2) *FAILURE TO PROVIDE A WORK CONTRACT, MAKE WRITTEN DISCLOSURES AS TO THE TERMS OF EMPLOYMENT AND POST SUCH TERMS*

Even a cursory examination of this cause reveals that the farmworkers suffered not from PVFA's denial or failure in providing them a tangible expression of their work agreement, but from PVFA's failure to comply with the agreed terms of such an agreement. The mere posting of such an agreement or the providing each farmworker with such an agreement would patently serve little, if any, purpose in forcing PVFA to obey the terms of the work agreement with the farmworkers. Of all the stated sins, these must rank as the least.

Accordingly, the sum of FIFTEEN and no/100 DOLLARS ($15.00) is assessed for each of their failures to:

(1) post the written terms of employment;

(2) provide each farmworker with an employment contract; and

(3) make written disclosures to each farmworker as to the terms of that employment contract.

(3) *FAILURE TO KEEP ADEQUATE WAGE RECORDS AND TO PROVIDE WAGE RECEIPTS*

The harsh impact suffered by the farmworkers because of PVFA's intentional violations of FLCRA does not stem from PVFA's extremely amateurish and fraudulent accounting practices, but from PVFA's failure to comply with the actual terms of the work agreement. Although more adequate and complete bookkeeping practices were certainly envisioned by Congress, PVFA's compliance with the law would have provided the farmworkers with little more than a written record of their unfortunate plight. As such the sum of FIFTEEN and no/100 DOLLARS ($15.00) is assessed as statutory damages for each of PVFA's violations in:

(1) failing to keep adequate wage records; and

(2) failing to provide each farmworker with itemized wage receipts.

See generally Rivera v. Adams Packing Ass'n., Inc., 707 F.2d 1278 (11th Cir. 1982) (duty to keep "facially" accurate wage records as demanded by FLCRA).

(ii) *SUBSTANTIVE VIOLATIONS*

The focal point of PVFA's and its members' illegal actions is their general disregard for the terms and conditions of their employment contract with the farmworkers. These violations, being quite distinct from the other abstract technical violations, directly affect the quality—or the lack of quality—of the farmworker's life. These violations are:

(1) PVFA's failure to provide the piece rate laborers—the majority of workers—with a minimum wage;

(2) PVFA's failure to provide free tools;

(3) PVFA's failure to provide free insurance;

(4) PVFA's failure to pay a weekly transportation expense; and

(5) PVFA's failure to pay to farmworkers who journeyed into the area to work from outside of the Presidio/Ojinaga area the promised housing allowance.

It is inherent in our system that a laborer be paid a just and fair wage for his or her toil. This is even more compelling when that minimum wage established by law, is an inducement for the laborer to assume the responsibilities and liabilities of that employment. It seems only reasonable to state further that this general principle has two applicable corollaries in this action. One is that a worker be reimbursed for any expense incurred in obtaining and performing that task when such reimbursement is promised to him. This is seen in this cause as the promise to reimburse farmworkers for the housing expenses caused by their relocation into the area to toil. The other corollary is that a worker may not be forced to purchase the tools he employs in his trade when he, in fact, shall not own those tools, but merely is allowed to use them for the task at hand.

The evidence presented in this cause shows an intentional pattern and practice by PVFA and its members in failing to provide piece rate laborers with the required minimum wage due them, in charging the farmworkers for the tools employed in their toil, and in failing to provide the required insurance for the farmworkers. All of these things were knowingly and intentionally done in violation of federal statute and regulation.

The evidence presented additionally reveals that many laborers earned less than one dollar an hour for their onerous, back-breaking labor as piece rate laborers, while

at the same time being charged "top dollar" for tools used in their labor. Such seems clearly unconscionable.

The evidence also shows that numerous farmworkers were induced into journeying to the Presidio/Ojinaga area from their distant homes to labor for PVFA. Under the terms of the work agreements, the representations made to the government in the petitioning process, and the applicable regulations, PVFA was required to pay these truly "migrant" farmworkers $5.00 per day for their housing expenses. Such was clearly not done.

The evidence also reveals that the farmworkers were never reimbursed for their transportation costs incurred daily for their transportation from their residences to the farm fields. It appears that, although such was promised by PVFA in its representations to the government and the farmworkers, such was never done. The evidence shows that the average price of $1.00 per day was spent by each of the farmworkers for transportation to the farm fields. Such amount, which might appear to be slight, is relatively a large sum of money to a person who is paid less than that amount per hour. It seems quite unconscionable for a farmworker to toil for an entire hour to pay for something that was otherwise promised to him.

No excuses can be made, nor any mitigation countenanced as to these violations. As such, the sum of THREE HUNDRED and no/100 DOLLARS ($300.00) is awarded against PVFA for each farmworker who labored as a piece rate laborer at any time during the 1978-79 growing season.[6]

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[6]PVFA's violations bring to this Court's mind the biblical admonition that:

> Thou shall not oppress an hired servant that is poor and needy, whether he be of thy brethern, or of thy strangers that are in thy land within thy gates: At his day thou shalt give him his hire, neither shall the sun go down upon it; for he is poor, and setteth his heart upon it; lest he cry against thee unto the Lord, and it be sin unto thee. Deuteronomy 24:14-15.

See also Leviticus 19:13; *Jeremiah* 22:13.

The sum of FIFTY and no/100 DOLLARS ($50.00) is awarded each farmworker for transportation costs. The sum of THREE HUNDRED FIFTY and no/100 DOLLARS ($350.00) is awarded as the promised and required housing expenses to each of the individuals who journeyed into the Presidio/Ojinaga area from their distant homes.

(iii) *DAMAGES*

Accordingly, the following amounts are awarded as statutory damages as to each violation suffered by the farmworkers. The actual application of these damages as to each farmworker is set forth in the findings of Fact and Conclusions of Law listed in Appendix "A" of this Memorandum Opinion. The damages awarded are:

VIOLATION	*AMOUNT AWARDED PER VIOLATION*
Failure to register as a farm labor contractor	$ 15.00 (all farmworkers)
Failure to provide a work contract to each farmworker	15.00 (all farmworkers)
Failure to post the conditions of employment	15.00 (all farmworkers)
Failure to keep wage records	15.00 (all farmworkers)
Failure to provide wage receipts	15.00 (all farmworkers)
Failure to comply with the terms of employment	300.00 (all piece rate farmworkers—119 farmworkers)
Failure to reimburse transportation expenses	50.00 (all farmworkers)
Failure to pay housing expenses	350.00 (all farmworkers who journeyed into work area—11 farmworkers)

This principle of paying a laborer for his overnight travels is also seen in modern law. Such strikes very close to home. *See* 5 U.S.C. § 5707(a); 28 U.S.C. § 604(a)(7); *Guide to Judiciary Policies & Procedures*, Volume III, Title 16.

III.

Having determined the amount of money damages for each distinct violation in light of the considerations previously discussed, this Court must now determine who actually owes these damages to the farmworkers and, as such, who must bear the burden of paying these statutory damages.

In review, this action was originally filed in May of 1978 by the Plaintiff PVFA on behalf of its members to compel the Department of Labor and the Immigration and Naturalization Service to issue temporary nonimmigrant agricultural farmworker visas (H-2 visas) to PVFA so that its dues paying members could import and *jointly* hire temporary Mexican national farmworkers for the 1978-79 growing season. *See* 20 C.F.R. § 655.206(b)(3); 8 U.S.C. § 1184(c). ANTONIO MONTELONGO and MARIE MONTES, two Mexican-American *domestic* farmworkers, thereafter sought to intervene into the action alleging, *inter alia*, that Plaintiff PVFA had refused to hire them as farmworkers that year because of PVFA's stated intent of hiring cheaper Mexican national farmworkers. MONTELONGO and MONTES sought to represent a class of *domestic* farmworkers situated as they—unemployed. Ignoring the domestic farmworkers' contentions, the federal court (per J. Sessions) entered a preliminary injunction ordering the issuance of the H-2 visas. Shortly thereafter, two H-2 visa recipients, ESTEBAN ZUNIGA and MELQUIADES LARA, sought to intervene into the action on behalf of a class of Mexican national farmworkers who had been hired by PVFA and its dues paying members under the H-2 visa program. In their original complaint in intervention, ZUNIGA and LARA sought monetary damages for the various and sundry FLCRA violations previously discussed herein from PVFA in its representative capacity. Subsequently on March 3, 1982, Plaintiff PVFA's claims against the Department of Labor and the Immigration and Naturalization Service were dismissed and this cause was transferred to this Court sitting in the Pecos Division of the Western District of Texas.

On December 27, 1982, the farmworkers amended their complaint in intervention and stated their intention to seek monetary damages from not only the assetless non-profit agricultural association, PVFA, but also from the dues paying members of the association. This Court "freely granted" leave to amend their complaint; however, such leave was not needed since PVFA had not yet filed any answer to the complaint brought in intervention. *See* Fed. R. Civ. P. 15(a); *Foman v. Davis*, 371 U.S. 178 (1962); *Harkless v. Sweeney Independent School District*, 554 F.2d 1353 (5th Cir. 1979), *cert. denied*, 434 U.S. 966.

The individual members, through the same counsel that represents PVFA, now contend that such amendment is impermissible since any claim against the individual dues paying membership is barred by the applicable statute of limitations. *See* Tex. Rev. Civ. Stat. Ann. art. 5527 (four year statute of limitations). Having reviewed the voluminous pleadings filed by the parties in this cause as to this contested legal point and the controlling legal authorities, this Court must disagree.

Initially this Court must note that the H-2 farmworkers' original complaint in intervention attempted to represent a class of individuals situated as ZUNIGA and LARA—a class of H-2 farmworkers. Since this pending class certification was not ruled upon and denied until April 3, 1983, the statute of limitations was tolled as to all members of the prospective class who now seek relief in intervention in this action. *Crown, Cork, and Seal v. Parker,* U.S. , 76 L.Ed. 2d 628 (1983); *American Pipe & Construction v. Utah*, 414 U.S. 538 (1944). As such, the statute of limitations cannot now be employed as a bar to the farmworkers seeking monetary relief in this action. However, the question still remains as to from whom may they now recover that monetary award.

The individual members of the association argue that, although the statute of limitations arguably was tolled by the pending certification status of the prospective class,

the action was tolled only as to the claims brought against the original counterclaim defendant, PVFA. The members continue that to allow the tolling principle to extend to the joining of additional counterclaim defendants would be to strip the statute of limitations of its effect. This Court must disagree.

Federal R. Civ. P. 15(c) states:

> (c) *Relation Back of Amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

In this action there is no question that the amended claim "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading;" nor is there any doubt, as just explained previously, that the amended claim was brought "within the period provided for by law for commencing the action." It is also obvious to any person who even gives the record even a cursory review that the members "received such notice of the institution of the action that [they] will not be prejudiced in maintaining [their] defense on the merits." Such conclusion is predicated upon the facts that:

(1) all discovery in this cause has been directed solely to the individual members who actually employed the farmworkers and who violated the terms of FLCRA; and

(2) this cause is in effect a companion case to another suit brought by several hundred nonimmigrant Mexican national farmworkers complaining of counterclaim Defendants' FLCRA violations in which the association and the individual members were sued. (This other case proceeded differently in that PVFA was not yet an incorporated association at the time of these FLCRA violations.)

As such, this Court is strongly of the opinion that no complaint may be heard from the individual members as to any notice received as to the pending nature of this suit. In essence, no prejudice has been shown, and none can be shown.

The sole question remaining before this Court is whether the farmworkers' alleged failure in joining the dues paying members as parties in this action was "but for a mistake concerning the identity of the party [to be sued]." In examining this record *with doing justice in mind*, this Court finds that the evidence shows that any such failure was such an excusable error contemplated by Fed R. Civ. P. 15(c). *See generally Travelers Insurance Co. v. Brown*, 338 F.2d 229, 234 (5th Cir. 1964) (primal case on liberal relation back doctrine invisioned in thereafter amended Fed. R. Civ. P. 15). Such conclusion is founded upon the facts that:

(1) PVFA and its members were joint employers of the farmworkers under federal regulation;

(2) PVFA and its members clearly knew of such joint employer status;

(3) PVFA originally brought this action in a representative capacity on behalf of its dues paying members to obtain the H-2 visas for its members' farms; and

(4) the overwhelming, substantial injustice which would arise if the farmworkers, a group of foreign citizens, uneducated in our system of justice, had to look only to the nonprofit agricultural association for the monetary recovery of damages caused by the dues paying members' intentional ignorance of federal law.

This Court is generally guided by the wisdom of the United States Supreme Court as set forth in *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1962), in which Justice Black stated for the Court:

> These rules [of civil procedure] were designed in large part to get away from some of the old procedural booby traps which commonlaw pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona-fide complaints be carried to an adjudication on the merits.

See Kirk v. Cronvich, 629 F.2d 404 (5th Cir. 1980); *Marks v. Prattco, Inc.*, 607 F.2d 1153 (5th Cir. 1979).

CONCLUSION

Having determined that PVFA was a farm labor contractor during the growing season in issue in this cause, that PVFA breached the statutory and regulatory duties imposed by FLCRA during that growing season, and that the individual dues paying members of PVFA were jointly responsible for the statutory damages resulting from those violations, this Court has entered these Findings of Facts and Conclusions of Law in Memorandum Opinion form pursuant to Fed. R. Civ. P. 52(a).

As can be readily seen in reviewing this action, the parties have fashioned an imaginative and highly practical method of presenting the claims of several hundred Mexican national farmworkers, the vast majority of whom do not speak English. In so doing with the approval of this Court, representative witnesses established the basic factual background and legal theories upon which all of the farmworkers were proceeding. The parties then submitted to this Court the sworn discovery material generated in this cause, which was examined and reviewed by this Court. This Court has then made the findings and conclusions contained in this

Memorandum Opinion. Although at first glance this might appear unorthodox, such method guaranteed the fairest forum for the presentation of claims and defenses, while allowing this Court to maintain its assault on its otherwise awesome trial docket.

SIGNED and ENTERED this 11th day of April, 1984.

LUCIUS D. BUNTON
United States District Judge

APPENDIX B

Judgment Of The United States District Court For The Western District Of Texas, Pecos Division

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

CIVIL ACTION No. P-82-CA-15

PRESIDIO VALLEY FARMERS ASSOCIATION, *et al.*

v.

ANTONIO MONTELONGO, *et al.*

JUDGMENT

In accordance with this Court's Findings of Fact and Conclusions of Law heretofore entered:

IT IS ORDERED, ADJUDGED and DECREED that Defendants recover from Plaintiffs the sum of SIXTY-FIVE THOUSAND FOUR HUNDRED and no/100 DOLLARS ($65,400) in this action brought pursuant to 7 U.S.C. § § 2041, *et seq.* These sums are awarded to each Defendant as set forth in Appendix A of this Court's Findings of Fact and Conclusions of Law.

IT IS FURTHER ORDERED that Plaintiffs pay all costs of court incurred herein, for which execution may issue if not timely paid.

SIGNED and ENTERED this 11th day of April, 1984.

LUCIUS D. BUNTON
United States District Judge

APPENDIX C

**Order Of The United States District Court
For The Western District Of Texas,
Pecos Division
Amending Judgment**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

CIVIL ACTION No. P-82-CA-15

PRESIDIO VALLEY FARMERS ASSOCIATION, *et al.*
Plaintiffs

v.

ANTONIO MONTELONGO, *et al.*
Defendant-Intervenors

**ORDER AMENDING AND
CORRECTING JUDGMENT**

Defendant-Intervenors Motion to Amend or Correct the Judgment is hereby granted. The list of the Intervenors and the amounts awarded to them, which was attached to the Court's Memorandum Opinion, is corrected as set forth on the attached sheets. The total amount of the judgment is corrected to award Defendant-Intervenors a total amount of $67,625.00.

Done this 2nd day of May, 1984.

LUCIUS D. BUNTON
United States District Judge

APPENDIX D

Opinion Of The United States Court Of Appeals For The Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CIVIL ACTION No. 84-1432

PRESIDIO VALLEY FARMERS ASSOCIATION, *et al.*,
Plaintiff—Appellee—Cross Apellant,

v.

WILLIAM E. BROCK, Secretary of Labor, *et al.*,
Defendants,

ANTONIO MONTELONGO, *et al.*,
Defendants—Intervenors—Appellants—Cross Appellees.

Appeals From The United States District Court For The Western District Of Texas

Before THORNBERRY, RUBIN and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Some 250 Mexican nationals employed by the Presidio Valley Farmers Association and its grower members during the 1978 harvest season complain of numerous violations of the Farm Labor Contractor Registration Act and of breaches of the promised terms of employment. The workers prevailed below and both sides appealed. Most of the issues presented to us were resolved in *Salazar v. PVFA*, F.2d , slip op. 5777 (5th Cir. 1985), a related case we decide today, and we answer them with reference to that decision. Two issues are not identical to those presented in *Salazar*. On those points we vacate and remand the district court's award of damages for breaches of the work agreement and reverse the judgment below insofar as it

was assessed against the individual growers jointly and severally for the FLCRA violations of the PVFA.

I

This appeal is a sequel to *Salazar* and we reference the statement of facts set out in that opinion. We add only the following paragraphs which describe additional circumstances relevant to this appeal.

In the winter and spring of 1978, while PVFA and its members were still employing Mexican nationals who held H-2 visas issued in June 1977, the Association began plans to obtain labor for the 1978 harvest. PVFA was essentially the same organization it had been before, except that in November 1977, it incorporated as a non-profit corporation under the laws of the State of Texas. The stated purpose of PVFA was, as before, "to contract for and obtain migrant labor for the use of its members."

The Department of Labor again refused to certify PVFA's petitions to import alien labor, and this time the INS declined to issue the visas without certification. Agents from DOL had investigated the work conditions provided in the 1977 harvest season and had reported numerous violations of the conditions of employment required by its H-2 regulations. In the face of such abuses, INS was unwilling to issue the requested visas.

By May of 1978 PVFA and its grower members were desperate for harvest workers. Claiming that the Valley's onion crop was "rotting in the fields," PVFA petitioned the federal district court in El Paso on behalf of its grower members and sought an injunction requiring DOL to issue certification for the requested workers and requiring INS to issue visas for them. The court issued the injunction, but conditioned its issuance on PVFA's compliance with the minimum terms of work required by DOL's H-2 regulations. These terms included a ¾ work guarantee, a wage of $2.97 per hour, a $5 per day housing allowance, and $8 per week transportation allowance, and a promise to pay travel ex-

penses for all workers who travelled into the area from outside Presidio/Ojinaga. In 1978 these conditions of employment were codified at 20 C.F.R. § 655.200 *et seq.*

Shortly thereafter, two H-2 visa recipients, Estaban Zuniga and Melquiades Lara, sought to intervene in the injunction suit to assert a counterclaim against PVFA on behalf of a class composed of all H-2 workers certified under the 1978 petitions. The intervenors alleged that despite the conditions imposed by the district court when it issued its injunction, PVFA and its grower members were not honoring the terms and conditions of employment required by the H-2 regulations. The intervention petition was not granted until March 18, 1981, and approximately one year later, the case was transferred to the Pecos division, the court that was handling *Salazar*. Both cases involved many of the same parties. In December 1982 the court granted the workers leave to amend their counterclaim to allege violations of the FLCRA and to add as defendants PVFA's member growers.[1] The charges made in the counterclaim were substantially the same as those made in the complaint in *Salazar*, and the court handled the two cases in a similar fashion.

As in *Salazar* the workers' petition for class certification was denied on the basis that common issues did not predominate with respect to liability and damages, and the case therefore proceeded with some 250 named intervenors.[2] Although the court did not need to determine the terms and conditions of the employment agreement as it had in *Salazar*,[3] it utilized an identical procedure to that used in *Salazar* to

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[1]For convenience sake we will refer to counterclaim defendant PVFA and its members as "defendants."

[2]Only two workers had initially intervened and brought counterclaims against PVFA, but the court allowed some 248 Mexican workers to join the case as intervenors.

[3]Those conditions were set when the El Paso court, in granting PVFA's requested injunction for the issuance of the H-2 visas, ordered it to comply with DOL's H-2 regulations.

determine liability and damages for the breaches of the FLCRA and the work agreement. In fact, the liability/damages trial described in *Salazar* was the same trial used to assess liability and damages in the instant case. The court also considered motions for summary judgment analogous to those filed in *Salazar*, motions supported by the workers' answers to defendants' interrogatories.

As in *Salazar*, the workers did not seek actual damages and instead requested the court to award liquidated damages under the FLCRA both for the violations of that act and for defendants' breaches of the work agreement. The damages awarded by the district court were, for the most part, identical to those determined in *Salazar*. The court assessed liability and damages against PVFA and its grower members jointly and severally for all of the found violations of the FLCRA and breaches of the work agreement.

Both sides appeal, raising many of the same issues we resolved in *Salazar*. The workers' complaints about the damages award for breaches of the work agreement differ slightly from those made in *Salazar*, and defendants bring one additional point, arguing that because PVFA was incorporated under Texas law in 1978, its individual members cannot be held vicariously liable for the damages assessed against PVFA.

II

We address first those issues in this appeal that are controlled by our decision in *Salazar*. That case disposes of the workers' complaints regarding the court's liquidated damages awards of $15.00 for the various violations of the FLCRA and those regarding the court's refusal to certify as a class under Fed.R.Civ.P. 23(b)(3) the H-2 workers employed during the 1978 harvest season.[4] *Salazar* also fore-

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[4]We also reject the workers' claim that the district court erred in failing to hold defendants liable for making "false and misleading statements" about the terms and conditions of employment for the reasons stated in note 8 of our opinion in *Salazar*.

closes defendants' claims that PVFA did not function as a farm labor contractor, that it did not function as a farm labor contractor with respect to these workers, and that its violations of the FLCRA were not intentional.[5]

III

Both the workers' and the defendants' complaints about the district court's damage award for breaches of the work agreement are similar to those made in *Salazar*. The workers complain that the district court erred in refusing to award damages for defendants' breach of the ¾ work guarantee and in limiting the award to those workers employed on a piece rate basis. Defendants again challenge the trial/summary judgment procedure employed by the court to determine liability and damages.

As in *Salazar*, we vacate the award of damages for breaches of the work agreement so that the district court can make findings on defendants' liability for the asserted breaches of the ¾ work guarantee and the damages, if any, to be awarded for that breach. The court should explain as well its basis for awarding no damages to non-piece rate workers for the alleged breaches of the work agreement. Finally, on remand the court should obtain express consent from all counsel on the procedures to be followed in assessing liability and damages for the breaches of the work agreement.

IV

The district court made no distinction between PVFA and its members when it assessed liability and damages in the instant case. The court rejected defendants' complaints that the workers should not have been permitted to amend their counterclaim to add the individual growers as

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[5]As for the complaints by both parties that the district court erred in determining that certain intervenors were or were not entitled to the housing allowance, we conclude that the district court's determinations were based on factual findings which are not clearly erroneous.

defendants[6] but did not address the additional defense that the growers could not be held liable under the FLCRA for what PVFA, the corporation, had done. The court simply stated: "PVFA breached statutory and regulatory duties imposed by FLCRA during [the 1978] growing season, and . . . the individual dues paying members of PVFA were jointly responsible for the statutory damages resulting from the violations. . . ."

On appeal the individual grower defendants reassert the argument made below that, under Texas law, "the members of a non-profit corporation shall not be personally liable for the debts, liabilities, or obligations of the corporation." Tex. Rev.Civ. Stat. Ann. art. 1396-2.08(E). Because PVFA was the only farm labor contractor in this case, to the extent the damages the district court awarded were based on violations of the FLCRA which could have been committed only by a farm labor contractor, the individual growers cannot be held responsible for them.

The workers offer three theories for holding the members of PVFA jointly and severally liable with the Association: that the individual members are liable for the damages under the "joint employer" theory applied in *Salazar;* that the individual members of PVFA are liable for its violations on the ground that the violations were tortious acts committed personally by the individual members; and that the PVFA was a sham corporation. We are not persuaded by any of these arguments.

1

The "joint employer" concept applied in *Salazar* cannot help the workers here. In *Salazar* the PVFA was held liable under the FLCRA for its violation of its statutory obligations under the Act as well as for the growers' breaches of

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[6]We conclude that the district court was within its discretion in permitting intervenors to so amend their counterclaim under Fed.R.Civ.P. 15(c).

the workers' employment agreement. The first set of obligations was triggered by PVFA's status as a farm labor contractor, and the obligation to honor the work agreement by PVFA's status as a farm labor contractor who jointly employed the workers with the member growers. The FLCRA expressly imposed both sets of obligations on the Association, but only because the PVFA first met the statutory requirements which made it a farm labor contractor.

As we explained in *Beliz v. McLeod & Sons Packing Co.*, F.2d , slip op. 5729 (5th Cir. 1985), the FLCRA provides separate sets of obligations for contractors and growers. *Id.* at , slip op. at . We there concluded that, given the Congressionally imposed division of responsibility between these parties, a grower could not be held vicariously liable for the FLCRA violations of a farm labor contractor who also functioned as the grower's agent. For the same reasons, the "joint employer" concept cannot support the district court's imposition of joint and several liability on the growers for *PVFA*'s omissions. Such joint responsibility would effectively negate the statutory distinctions we preserved in *Beliz*.

2

Nor are the individual growers responsible for the FLCRA damages assessed against PVFA on the ground that the violations were committed by them as agents of the corporation. We recognize that a corporation's violations of certain statutory duties have been held to be tortious in nature, *see, e.g., Rohm & Haas Co. v. Dawson*, 557 F.Supp. 739, 818 (S.D.Tex. 1983), *rev'd on other grounds*, 722 F.2d 1556 (Fed.Cir. 1983), and that corporate officers can be held liable for such violations if they personally participate in them or direct others to carry them out, *see, e.g., L.C.L. Theatres v. Columbia Pictures, Inc.*, 619 F.2d 455 (5th Cir. 1980), but we need not inquire whether the statutes and acts at issue here trigger such liability. The workers have not made sufficiently specific allegations or proof to support the theory.

The workers ask us to affirm the imposition of joint and several liability on *all* of the growers for *all* of the found violations of the FLCRA by the PVFA on a theory which, by its very nature, requires individualized proof. Even if we assume that each of the grower members violated the terms of the workers' employment agreement, such actions would render the individual defendants liable only to those workers they employed, not to workers employed by others. Having eschewed individual proof for a trial on liability and damages based on the testimony of "representative" H-2 workers and only a few of the individual defendants, the workers have not created a record that will support the proffered theory.

3

The workers raised too late the only theory for joint and several liability that has arguable merit—that the grower members are personally liable because the corporate form of PVFA was a "sham." If PVFA's corporate veil were pierced, joint and several liability such as that assessed in *Salazar* would be appropriate, but the workers neither pleaded nor tried their case on the sham theory. Indeed, the argument was not raised until the workers filed their Brief in Support of Judgment a month after the liability/damages trial. Absent pleadings and evidence to support the theory or trial by consent, the district court could not have used the sham corporation theory to impose joint and several liability on the growers for the damages assessed against PVFA; nor can we do so on appeal.

V

There are two violations of the FLCRA for which the individual defendants, although they are not farm labor contractors, may be liable: (1) failure to ensure that PVFA was registered with DOL as a farm labor contractor as required by 7 U.S.C. § 2043(c); and (2) failure to maintain wage records as required by 7 U.S.C. § 2050c. The workers requested damages from the individual defendants for these violations in their amended counterclaim and the record

indicates that both requirements may have been violated. Accordingly on remand the workers are entitled to seek damages from the growers for any such violations, but only on an individual basis—each worker from his employer. The growers are not jointly and severally liable for these violations. Nor are the individual grower defendants liable for the breaches of the work agreement, because the workers have pursued that claim only against PVFA.[7] Indeed, the workers could not recover such damages against the individual defendants under the FLCRA because 7 U.S.C. § 2044(b)(4), which requires an agricultural employer to abide by the terms of his work agreement, applies only to agricultural employers who are also farm labor contractors.

VI

In sum, we reference *Salazar* for our resolution of all issues in this appeal save two. The damages award for breaches of the work agreement is vacated and remanded for redetermination, and all damages awards by the court are reversed to the extent they impose joint and several liability on the individual grower defendants for the FLCRA violations of PVFA.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART AND REMANDED.

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[7]The workers have waived such individual contract claims if those claims were ever asserted. They state in note 4 of their reply brief:

> [Intervenors] did not contend [below] and do not now that the individual growers were parties in a suit to enforce separate employment relationships with the individual employees on their farms. The counterclaim was directed at the employment relationship between [the workers] and PVFA; the individual growers were parties to the suit in their capacity as members of PVFA, jointly and severally liable for the employment relationship entered into by PVFA, not for any "separate employment relationship with their individual employees."

APPENDIX E

**Order Of The United States Court Of Appeals
For The Fifth Circuit
Denying Petitions For Rehearing**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CIVIL ACTION No. 84-1432

PRESIDIO VALLEY FARMERS ASSOCIATION, *et al.*,
Plaintiff—Appellee—Cross-Appellant,

v.

WILLIAM E. BROCK, Secretary of Labor
and U.S. DEPARTMENT OF LABOR, *et al.*,
Defendants,

ANTONIO MONTELONGO, *et al.*,
*Defendants—Intervenors—
Appellants—Cross-Appellees.*

**Appeals From The United States District Court
For The Western District Of Texas**

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC (Opinion July 25, 1985, 5 Cir., 198 , F.2d) (September 19, 1985).

Before THORNBERRY, RUBIN and HIGGINBOTHAM, Circuit Judges, PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

PATRICK E. HIGGINBOTHAM
United States Circuit Judge